

---

**SUPREME COURT  
OF THE  
STATE OF CONNECTICUT**

---

**SC 19662**

---

**STATE OF CONNECTICUT**

**v.**

**JUBAR T. HOLLEY**

---

**BRIEF OF THE DEFENDANT-APPELLANT**

---

WILLIAM A ADSIT, Esq  
Personal Juris No. 425878 / Firm Juris No. 434478  
ASSIGNED COUNSEL  
LAW OFFICE OF CHRISTOPHER DUBY, LLC  
2558 WHITNEY AVENUE, SUITE 203  
HAMDEN, CONNECTICUT 06518  
TEL: (203) 234-2888 / FAX: (203) 234-1329  
EMAILS: [william@cdubylaw.com](mailto:william@cdubylaw.com)

TO BE ARGUED BY: WILLIAM A ADSIT, Esq

---

## TABLE OF CONTENTS

Table of Contents .....	i
Statement of the Issue .....	iii
Table of Authorities .....	iv
I. Nature of the Proceedings .....	1
II. Statement of Facts.....	2
A. Facts related to the search warrant application/affidavit. ....	2
B. The original finding of probable cause and the charges. ....	3
C. Defendant's motion to suppress and the hearing on the motion. ....	4
D. The trial court's memorandum of decision. ....	4
III. Argument: The trial court erred by denying Defendant's motion to suppress. ....	5
A. Relevant Facts. ....	5
B. Reviewability. ....	5
C. Standard of Review. ....	5
D. Legal Standards. ....	5
1. Constitutional rules. ....	5
2. Motions to suppress based on lack of probable cause. ....	6
3. Probable cause standards. ....	6
E. Arguments. ....	8
1. The trial court erred in finding the search warrant application in Defendant's case was supported by probable cause. ....	8
a. The search warrant application for Defendant's home failed to establish a substantial basis that criminal activity was at large. ....	8

b. The additional factors listed in the search warrant application for Defendant's home did not provide a sufficient basis for probable cause. ....	18
i. The search warrant application for Defendant's home was premised on unreliable information, conclusory statements and/or specious "corroboration." ....	19
a. Pierro was not shown to be a sufficiently reliable source of information and the police's "corroboration" of his allegations did not make criminal activity more likely or bolster Pierro's reliability. ....	19
b. Defendant's nearly 20-year-old conviction provided little support for probable cause. ....	25
c. The affiant officers had not demonstrated expertise with firearms. ....	27
ii. The trial court made additional improper findings that are not contained in the warrant application. ....	32
2. The trial court's erroneous finding of probable cause was harmful error. ....	33
IV. Conclusion and Requested Relief .....	34

### **STATEMENT OF THE ISSUE**

- I. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS?

## **TABLE OF AUTHORITIES**

### **FEDERAL AND CONNECTICUT CONSTITUTIONAL PROVISIONS**

Amend. 4, U.S. Const. ....	4, 5, 5 n.4
Art. first, § 7, Conn. Const. ....	4, 5

### **CONNECTICUT CASES**

<u>State v. Barton</u> , 219 Conn. 529, 594 A.2d 917 (1991) .....	7, 7 n.6, 8 n.7, 24, 27
<u>State v. Belanger</u> , 55 Conn. App. 2, 738 A.2d 1109 (Conn. App. 1999) .....	11
<u>State v. Buddhu</u> , 264 Conn. 449, 825 A.2d 48 (2003) .....	6
<u>State v. Covelli</u> , CR18-78031, 1993 Conn. Super. LEXIS 2321 (Conn. Super. Ct. Sept. 14, 1993) .....	22
<u>State v. Duntz</u> , 223 Conn. 207, 613 A.2d 224 (1992) .....	6, 7, 20, 24, 25, 27, 32, 34
<u>State v. Jubar Holley</u> , HHD-CR13-0242938-T .....	1
<u>State v. Johnson</u> , 286 Conn. 427, 944 A.2d 297 (2008) .....	5
<u>State v. Kaminski</u> , 106 Conn. App. 114, 940 A.2d 844 (Conn. App. 2008) .....	6, 8-9
<u>State v. Marsala</u> , 216 Conn. 150, 579 A.2d 58 (1990) .....	6 n.5
<u>State v. Rosario</u> , 238 Conn. 380, 680 A.2d 237 (1996) .....	6
<u>State v. Shifflett</u> , 199 Conn. 718, 508 A.2d 748 (1986) .....	6, 7, 8, 32
<u>State v. Toccaline</u> , CR00-0109519, 2003 Conn. Super. LEXIS 2067 (Conn. Super. Ct. July 18, 2003) .....	6-7, 9, 14, 15, 17, 18, 18 n.16, 32, 34

### **FEDERAL CASES**

<u>U.S. v. Campbell</u> , 732 F.2d 1017 (1st Cir. 1984) .....	25, 27
<u>U.S. v. Falso</u> , 544 F.3d 110 (2d Cir. 2008) .....	8, 15, 16, 17, 25, 30, 32
<u>U.S. v. Gourde</u> , 440 F.3d 1065 (9th Cir. 2004) .....	32
<u>U.S. v. Perez</u> , 247 F.Supp.2d 459 (S.D.N.Y. 2003) .....	14, 16

<u>U.S. v. U.S. Dist. Ct.</u> , 407 U.S. 297 (1972) .....	34
<u>U.S. v. Vigeant</u> , 176 F.3d 565 (1st Cir. 1999) .....	8, 12-13, 13 n.14
<u>Wolf v. Colo.</u> , 338 U.S. 25 (1949) .....	5 n.4

## **OTHER STATES' CASES**

<u>Minn. v. Blackstein</u> , 507 N.W.2d 842 (Minn. 1993).....	25
<u>Burnett v. Fla.</u> , 848 So.2d 1170 (Fla. App. 2d Dist. 2003) .....	14, 17, 27, 28-29
<u>Minn. v. Carter</u> , 679 N.W.2d 199 (Minn. 2005) .....	13 n.14, 20, 25
<u>Parish v. Tex.</u> , 939 S.W.2d 901 (Tex. Crim. App. 1997) .....	20, 24
<u>Rojas v. Tex.</u> , 797 S.W.2d 41 (Tex. Crim. App. 1990) .....	20

## **CONNECTICUT STATUTES**

Conn. Gen. Stat. § 29-36 .....	1
Conn. Gen. Stat. § 53-202w .....	11 n.13
Conn. Gen. Stat. § 53a-3(19) .....	11
Conn. Gen. Stat. § 53a-202c .....	1
Conn. Gen. Stat. § 53a-211 .....	1
Conn. Gen. Stat. § 53a-212 .....	1
Conn. Gen. Stat. § 53a-217 .....	1, 2, 8, 9 n.8, 10-11, 18
Conn. Gen. Stat. § 53a-217(a)(1) .....	1, 2, 3, 9, 12, 26, 33
Conn. Gen. Stat. § 53a-217d .....	1
Conn. Gen. Stat. § 54-33a(b) .....	6
Conn. Gen. Stat. § 54-94a .....	2, 33

## **PRACTICE BOOK PROVISIONS**

Conn. Prac. Bk. § 41-12 .....	4
-------------------------------	---

Conn. Prac. Bk. § 41-13(4) .....	4
Conn. Prac. Bk. § 61-6(a)(2)(A) .....	33
<b>OTHER CONNECTICUT LEGAL SOURCES</b>	
Conn. Crim. Jury Instruction 8.2-8 .....	11
Public Act 13-3, § 24 .....	11 n.13
<b>OTHER FEDERAL LEGAL SOURCES</b>	
18 U.S.C. § 921(a)(3) .....	10 n.12
18 U.S.C. § 921(a)(3)(B) .....	10 n.12
18 U.S.C. § 922 .....	10 n.12
18 U.S.C. § 922(d) .....	10 n.12
18 U.S.C. § 923(a) .....	10 n.12
27 C.F.R. § 478.11 .....	10 n.12
27 C.F.R. § 478.92(a)(2) .....	10 n.12
ATF Rul. 2015-1 .....	10 n.12

## **I. NATURE OF THE PROCEEDINGS**

This is an appeal, brought pursuant to Conn. Prac. Bk. § 61-6(a)(2)(i), from the judgment of the trial court, Bentivegna, J., denying a motion to suppress filed by Jubar T. Holley, the Defendant-Appellant (hereinafter “Defendant”), in State of Connecticut v. Jubar Holley, HHD-CR13-0242938-T. In the criminal matter underlying this appeal, Defendant was originally charged with 38 counts of violating Conn. Gen. Stat. § 53a-217 (criminal possession of a firearm); five counts of violating Conn. Gen. Stat. § 53a-212 (stealing a firearm); three counts of violating Conn. Gen. Stat. § 53a-202c (illegal possession of assault weapon); one count of violating Conn. Gen. Stat. § 29-36 (illegal alteration of firearm identification); one count of violating Conn. Gen. Stat. § 53a-211 (possession of sawed-off shotgun or silencer); and one count of violating Conn. Gen. Stat. § 53a-217d (criminal possession of body armor). Def.’s App. at A1-A17. Ultimately, through a long-form information, the state charged Defendant with 38 counts of violating Conn. Gen. Stat. § 53a-217(a)(1) (criminal possession of a firearm).<sup>1</sup> Id. at A30-A50.

On or about July 17, 2014, Defendant filed a motion to suppress evidence discovered through the execution of a defective search warrant, see Def.’s App. at A61-A73, which was heard on July 22, 2014 by the trial court, Bentivegna, J., see 07/22/14 Tr. (Bentivegna). The trial court denied that motion and issued a written memorandum of decision, dated July 24, 2014. See Def.’s App. at A75-A87. On July 22, 2014, Petitioner entered a plea of nolo contendere to four counts of violating Conn. Gen. Stat. § 53a-

---

<sup>1</sup> Defendant was also charged under a separate file (CR13-0245453-T) with several offenses related to allegations that he had stolen items from his pawn shop employer, Good Ole Tom’s of East Hartford. Apparently determining the case lacked merit, the state entered nolle prosequis to the charges alleged in the “Good Ole Tom’s” case. See 09/25/14 Tr. at 28.

217(a)(1) on the condition that he would be allowed to file this appeal challenging the court's decision on Defendant's motion to suppress pursuant to Conn. Gen. Stat. § 54-94a. 07/22/14 Tr. at 1-12; Def.'s App. at A74. The state entered nolle prosequis as to the remaining 34 counts of violating Conn. Gen. Stat. § 53a-217(a)(1). Def.'s App. at A30-A37; 09/25/14 Tr. at 28. The trial court, Alexander, J., imposed a total effective sentence of nine years to serve followed by six years of special parole. 09/25/14 Tr. at 27-28. Defendant thereafter filed this appeal challenging the trial court's decision on his motion to suppress.

## **II. STATEMENT OF THE FACTS**

On March 14, 2013, police officers sought a warrant to search Defendant's home for "[f]irearms and related ammunition, firearm parts, MGW AR-15 AR15 90 round drum, firearm parts/pieces, papers/records related to the sale acquisition and assembly of firearms, papers/records referencing Gunbroker.com, papers/records indicating who resides in and/or controls the residence." Def.'s App. at A75.

### **A. Facts related to the search warrant application/affidavit.**

Taken without any common-sense criticism, the contents of the search warrant application affidavit (hereinafter "affidavit") claiming probable cause existed to search Defendant's home for firearms to substantiate a violation of Conn. Gen. Stat. § 53a-217 can be reasonably summarized as follows:

A man claiming to be a retired police officer, Pierro, called the police and reported that a man named Jubar Holley (who was later confirmed to be Defendant through confirmation of Defendant's home address through various routine investigatory means) had purchased an "M16 AR 15 A2 upper receiver" online from Pierro through Gunbroker.com, a Web site where firearm parts could be purchased. Pierro claimed he only used Gunbroker.com as part of his "hobby" of selling firearm parts, which included the aforementioned upper receiver. Pierro "Googled" Holley's name on the Internet and purportedly discovered a "shooting" involving Holley from "several" years ago (actually nearly 20 years prior), which prompted Pierro's call. Pierro claimed the "only reason" someone would purchase an "M16 AR 15 A2 upper

receiver" was to construct an operable AR-15. The "ATF agree[d]" with this or some other conclusion. See footnote 21, *infra*. Pierro further claimed that unidentified Gunbroker.com "documents" indicated Holley had made eight prior purchases in the last two years on Gunbroker.com, and that the "likely" scenario based on this was that Defendant was constructing an AR-15 from parts. The ATF determined Defendant's latest purchase on Gunbroker.com (excluding Pierro's sale, presumably) was for an "MGW AR-15 AR15 90 round drum." Defendant was confirmed to have a 1996 conviction for conspiracy to commit assault in the first degree and to reside at the address connected to his purported Gunbroker.com account.

See Def.'s App. at A51-A53, A79-A83. Along with the above details, the affiant-officers also alleged various conclusions, founded on their purported "training and experience":

That because Defendant was legally able to purchase individual firearm parts, he could construct an AR-15 that he could not purchase complete; that because Defendant had apparently purchased firearm parts, he must be constructing an operable firearm and/or in possession of an operable firearm; that an "M16 AR 15 A2 upper receiver" was necessary to construct an AR-15; that "typical firearms owners" do not buy firearm parts, and that since Defendant did, he "very likely" had "advanced knowledge" of firearms, which in turn meant he "probably" possesses "other" operable firearms; and that "people who posses firearms illegally commonly store said firearms in their residence ... [to] prevent[] the criminal from being found in posses [sic] of a firearm by police in the course of daily activities."

See Def.'s App. at A51-A54, A79-A83 (grammatical and context changes added).

#### **B. The original finding of probable cause and the charges.**

Based on the above allegations from the affidavit, the trial court, Suarez, J., found probable cause to issue the warrant to search Defendant's home. The ensuing search turned up a number of firearms, most of which were antique and/or not operable, see Def.'s App. at A58-A60, A75; 09/25/14 Tr. at 14, and the state charged Defendant with 38 counts of violating Conn. Gen. Stat. § 53a-217(a)(1).<sup>2</sup> See id. at A30-A50.

---

<sup>2</sup> See footnote 1, *supra*.

**C. Defendant's motion to suppress and the hearing on the motion.**

On or about July 17, 2014, Defendant filed a motion to suppress and supporting memorandum of law based on the fourth amendment to the US constitution; article first, § 7 of the Connecticut constitution; and Conn. Prac. Bk. §§ 41-12 and 41-13(4). See Def.'s App. at A61-A73. Defendant argued, inter alia, that the search warrant at issue in this appeal lacked probable cause, and/or the "requisite indicia of reliability and basis of knowledge," for a number of reasons. See id. at A65-A72. On July 22, 2014, and following a hearing on the motion to suppress before the trial court, Bentivegna, J., denied Defendant's motion and reserved full explication for a written memorandum of law. 07/22/14 Tr. (Bentivegna).

**D. The trial court's memorandum of decision.**

The court, Bentivegna, J., issued its written memorandum of decision on July 24, 2014 after Defendant's nolo plea was entered and accepted. See Def.'s App. at A75-A87. In the decision, the court adopted the warrant's substantive text verbatim, and then proceeded to deny each of Defendant's arguments.<sup>3</sup> See id. at A84-A87. Among the court's findings that lacked a substantial basis were that Defendant "was in the possession of a firearm, which he was disqualified from possessing as a convicted felon," "was storing a firearm at his residence," and "was involved in the illegal trafficking of firearms," even though none of these was alleged in the affidavit. Compare Def.'s App. at A86-A87 with Def.'s App. at A51-A54. Defendant thereafter filed this appeal.

---

<sup>3</sup> The reasons for and additional details of the trial court's decision will be related, where relevant in the Argument section, infra.

### **III. ARGUMENT: THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPPRESS.**

**A. Relevant Facts.** The facts relevant to this claim are included in the Statement of the Facts, supra, or are discussed where relevant in the Argument section, infra.

**B. Reviewability.** The issues presented herein related to Defendant's motion to suppress, which were pleaded to the trial court by motion and supported by a memorandum of law, which the trial court heard and issued a decision denying. The issues were thereafter included in Defendant's issues on appeal, Def.'s App. at A91a, and were, therefore, properly preserved and recorded for this Court's consideration on appeal.

**C. Standard of Review.** "Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. ... The trial court's determination on the issue, therefore, is subject to plenary review on appeal." State v. Johnson, 286 Conn. 427, 433 (2008).

**D. Legal Standards.**

**1. Constitutional rules.** Article first, § 7 of the Connecticut constitution provides that the "people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." This provision, like its analog in the US constitution,<sup>4</sup> safeguards the privacy, personal security and property of the individual

---

<sup>4</sup> The fourth amendment to the United States constitution, made applicable to the states through the due process clause of the fourteenth amendment in Wolf v. Colo., 338 U.S. 25, 28 (1949), provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

against unjustified intrusions by the government.<sup>5</sup> Following from both of these state and federal constitutional provisions, Conn. Gen. Stat. § 54-33a(b) establishes the procedure for securing a constitutionally valid criminal search warrant.

**2. Motions to suppress based on lack of probable cause.** Motions to suppress premised on a search warrant's unconstitutional issuance for lack of probable cause, in the "absence of a showing that the information contained in the warrant is false or misleading or that there is a material omission from the affidavit," are "limited to a review of the four corners of the affidavit." State v. Rosario, 238 Conn. 380, 386 (1996).

**3. Probable cause standards.** For purposes of a search warrant, probable cause comprises "such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred." State v. Buddhu, 264 Conn. 449, 460 (2003). "[C]ommon rumor or report, suspicion, or even strong reason to suspect [criminal activity], are not sufficient to constitute probable cause." State v. Shifflett, 199 Conn. 718, 748 (1986) (internal citations and quotations omitted; context added); State v. Duntz, 223 Conn. 207, 220 (1992). In addition, the law requires that probable cause be measured against the offense law enforcement alleges in the warrant application to have been committed. See, e.g., State v. Kaminski, 106 Conn. App. 114, 133 (Conn. App. 2008); State v. Toccaline, CR00-0109519, 2003 Conn. Super.

---

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>5</sup> While the fourth amendment to the US constitution describes the "baseline" of Connecticut citizens' rights against unreasonable searches and seizures, article first, § 7 has been interpreted to provide more protections than its federal counterpart. Most notably, if a warrant affidavit does not provide a substantial basis for the finding of probable cause, then evidence or contraband seized in the execution of that warrant will be suppressed, even when the officer executing the warrant has relied in good faith on its authority. State v. Marsala, 216 Conn. 150, 171 (1990).

LEXIS 2067, at \*12-26 (Conn. Super. Ct. July 18, 2003). On subsequent review after its original issuance, the validity of a search warrant hinges on whether – based on a totality of the reliable circumstances contained in the affidavit supporting the warrant application – the affidavit “presented a substantial factual basis” for the issuing magistrate’s conclusion that probable cause existed.<sup>6</sup> Duntz, 223 Conn. at 215 (context added); State v. Barton, 219 Conn. 529, 544 (1991). Under this analysis, the affidavit must provide a factual basis demonstrating, *inter alia*, the reliability of its content and the affiants’ basis of knowledge for it. Barton, 219 Conn. at 544-545 (While the “magistrate is entitled to draw reasonable inferences from the facts presented,” the magistrate must still find that the affidavit “presents sufficient objective indicia of reliability to justify a search.”). If the magistrate issues the warrant, a court subsequently reviewing that decision only owes deference to the original magistrate’s “reasonable inferences” that are drawn from facts actually presented in the affidavit. Id. The magistrate’s finding of probable cause should only be accepted where the “circumstances for finding probable cause are detailed, where a substantial basis for crediting the source of information is apparent,” and where the “magistrate has in fact found probable cause.” Id. In addition, the “reviewing court may consider only the information that was actually before the issuing judge at the time he or she signed the warrant.” Shifflett, 199 Conn. at 746.

---

<sup>6</sup> The “‘totality of the circumstances’ analysis does not mean ... that a magistrate considering a search warrant application should automatically defer to the conclusion of the police that probable cause exists,” because “[s]uch deference would be an abdication of the magistrate’s constitutional responsibility to exercise an independent and detached judgment to protect the rights of privacy and personal security of the people of Connecticut.” Barton, 219 Conn. at 544.

**E. Arguments.**

**1. The trial court erred in finding the search warrant application in Defendant's case was supported by probable cause.**

Based on the totality of the circumstances, as related in the four corners<sup>7</sup> of the affidavit in support of the search warrant application for Defendant's home, the information purportedly in support of probable cause that Defendant failed to sufficiently establish Defendant violated Conn. Gen. Stat. § 53a-217. As a result, the trial court, Bentivegna, J., erred in ruling that the search warrant application properly supported probable cause of criminal activity.

**a. *The search warrant application for Defendant's home failed to establish a substantial basis that criminal activity was at large.***

The search warrant for Defendant's home was not premised on a legitimate allegation that criminal activity occurred. Probable cause must be founded on a substantial factual basis that "criminal activity" has been committed. Shifflett, 199 Conn. at 748; U.S. v. Falso, 544 F.3d 110, 120-121 (2d Cir. 2008); U.S. v. Vigeant, 176 F.3d 565, 569 (1st Cir. 1999). Because even a "strong reason to suspect" criminal activity has occurred is "not sufficient to constitute probable cause," Shifflett, 199 Conn. at 748, a warrant premised on what amounts to innocent behavior trumped up by the police's "mere suspicion" is inadequate to support probable cause. In Defendant's case, the affidavit alleged nothing more than lawful, innocuous behavior that did not support a finding of probable cause.

First, whether probable cause existed is necessarily measured through the prism of the offense the police allege in the warrant has been committed. See, e.g., Kaminski, 106

---

<sup>7</sup> Which is all the magistrate can consider. See Barton, 219 Conn. at 544-545.

Conn. App. at 122-133; Toccaline, 2003 Conn. Super. LEXIS 2067, at \*12-13. In Defendant's case, that offense was Conn. Gen. Stat. § 53a-217. Def.'s App. at A51. Hence, the police alleged there was probable cause to believe, from the contents of the affidavit alone, that Defendant, as a convicted felon, "possesse[d] a firearm, ammunition or an electronic defense weapon."<sup>8</sup> See Conn. Gen. Stat. § 53a-217(a)(1). But there is no substantial factual basis within the four corners of the affidavit establishing this.

First, assuming arguendo the reliability of the information the police had, there was no substantial factual basis to suggest Defendant was in possession of a firearm. The police were only able to confirm, according to the affidavit, that Defendant might possess<sup>9</sup> one firearm part, a 90-round drum magazine, and had attempted to take possession of a second part an "upper receiver." The affidavit fails to allege these parts together constituted an operable firearm, or even whether the two parts were compatible with one another. Lacking a factual basis to draw such critical conclusions, the police instead pointed to Defendant's eight past transactions<sup>10</sup> on Gunbroker.com (which occurred over the course of two years) and assumed Defendant had ordered more parts. But there was no basis for such an assumption. The items purchased in the alleged eight prior transactions were never identified. Again, even if we assume arguendo that the past transactions were for firearm parts, there is still no basis in the affidavit to conclude or infer that those transactions provided Defendant with the dozens of parts necessary to construct an

---

<sup>8</sup> Although the warrant application does not specify the subsection of Conn. Gen. Stat. § 53a-217 the police were alleging had been violated, a reasonable reading of the warrant makes it clear that the police were attempting to make a case that Defendant, a felon, was in possession of a firearm. The ultimate charges support this. See Def.'s App. at A18-A50.

<sup>9</sup> Defendant's "possession" of the upper receiver was constructive only because he never received the upper receiver part on account of Pierro's duplicity.

<sup>10</sup> Whether the eight prior purchases included the 90-round drum magazine was not specified in the warrant.

operable firearm.<sup>11</sup> Barring one of these allegations, supported by a substantial factual basis, the police were barred by the laws of physical reality from concluding that the two parts Defendant was allegedly known to have ordered could constitute a “firearm” within the meaning of the law. Despite this, the trial court accepted the police’s bait and switch tactic by first noting that Defendant was disqualified from owning a “firearm,” then finding that Defendant’s possession of the parts as the equivalent of his possession of an operable “firearm.” See Def.’s App. at A84-A85.

Firearm parts alone generally are not considered a “firearm” within the meaning of Connecticut or federal law.<sup>12</sup> Connecticut law defines a “firearm” for purposes of Conn. Gen. Stat. § 53a-217 as “any sawed-off shotgun, machine gun, rifle, shotgun, pistol,

---

<sup>11</sup> Defendant was not alleged to have attempted to criminally possess a firearm in the warrant application, nor was he charged with such an offense before or after execution of the search warrant for his home.

<sup>12</sup> Under federal law, a “firearm” is defined as “any weapon ... which will or is designed to or may be readily converted to expel a projectile by the action of an explosive,” or the frame or lower receiver of any such weapon, a firearm silencer, or a “destructive device.” 18 U.S.C. § 921(a)(3); 27 C.F.R. § 478.11 (defining the “frame or receiver” as the “part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism...”). Thus, under federal law the frame/lower receiver – which is the serialized portion of the firearm that houses the trigger mechanism and ammunition magazine in AR-15-type assault rifles – is the only firearm part (and even then only when it is more than 80% finished) that is regulated as if it were the complete firearm itself. See 18 U.S.C. § 921(a)(3)(B); 27 C.F.R. § 478.92(a)(2); ATF Rul. 2015-1 at 1-3 (included at Def.’s App. at A99-A101). Furthermore, sale of a finished lower receiver than can be used to construct an operable assault rifle requires a federal firearms seller’s license, 18 U.S.C. §§ 922 and 923(a), meaning the lower receiver portion of an AR-15 is a federally regulated firearm part that may not lawfully be sold somewhere such as Gunbroker.com without the seller being a federally licensed entity, see 18 U.S.C. § 923(a); ATF Rul. 2015-1 at 1-3 (Def.’s App. at A99-A101). This being the case, a felon would not be able to buy the most critical part of an AR-15, the lower receiver, from a legitimate business – such as Gunbroker.com – because felons are precluded from purchasing the lower receiver by virtue of 18 U.S.C. §§ 921(a)(3)(B) and 922(d). This being the case, it was not reasonable for the police to conclude Defendant had an operable firearm in his possession, based on his alleged purchase of two firearm parts, neither of which was regulated under federal or Connecticut law at that time.

revolver or other weapon, whether loaded or unloaded, from which a shot may be discharged.” Conn. Gen. Stat. § 53a-3(19). Subsequent case law has elaborated that the weapon in question must be operable to be a “firearm.” State v. Belanger, 55 Conn. App. 2, 7 (Conn. App. 1999), cert. denied, 251 Conn. 921 (1999); Conn. Crim. Jury Instruction 8.2-8. Connecticut law lacks a proscription analogous to federal law that treats the frame/lower receiver part as if it were the “firearm” itself, and that part is not at issue here anyway. Hence, at the time the warrant was sought here, neither of the firearm parts that Defendant purchased on Gunbroker.com were regulated or illegal for him to possess, even as a felon.<sup>13</sup>

---

<sup>13</sup> Granted, if Defendant had purchased the magazine post-April 4, 2013, then there might have been a basis for a violation of Conn. Gen. Stat. § 53-202w, because P.A. 13-3, § 24 made certain post-effective date possession of “large capacity magazines” (defined as magazines capable of containing more than 10 rounds of ammunition) a crime. But the ex post facto prohibition in the US Constitution prevents that possibility in this case since Defendant’s purchase of the magazine was in February 2013, according to the warrant. Def.’s App. at A53.

At the time Defendant allegedly purchased the 90-round magazine, as asserted in the warrant affidavit, purchase and possession of the magazine, even by him, was not a crime. Part of the fallout of the Sandy Hook mass murders in December 2012 was a frenzy, both in and outside of Connecticut, for gun owners to purchase assault rifles and assault rifle parts and components before a ban could be instituted on such firearms and components. See, e.g., Brett LoGiurato, Ammo Suppliers Everywhere Are Reporting Shortages From A Huge Surge In Demand, Business Insider (Dec. 26, 2012), available at <http://www.businessinsider.com/ammo-sales-newtown-ct-shooting-sandy-hook-school-brownells-2012-12> (last visited Sept. 20, 2015); Zach Carter, Gun Sales Exploded in the Year After Newtown Shooting, The Huffington Post (Dec. 6, 2013), available at [http://www.huffingtonpost.com/2013/12/06/gun-sales-newtown\\_n\\_4394185.html](http://www.huffingtonpost.com/2013/12/06/gun-sales-newtown_n_4394185.html) (last visited Sept. 20, 2015); Hunter Stuart, Americans Are Starting to Buy Guns at Slightly Less Ridiculous Rates, The Huffington Post (Aug. 29, 2014), available at [http://www.huffingtonpost.com/2014/08/29/gun-sales\\_n\\_5730272.html](http://www.huffingtonpost.com/2014/08/29/gun-sales_n_5730272.html) (last visited Sept. 20, 2015). This made firearm parts, such as a 90-round drum magazine for an AR-15, hot commodities that an enterprising party with experience as a pawn shop worker might recognize could be purchased online and “flipped” for a higher profit elsewhere. While such an opportunistic enterprise might justly be considered tasteless under the circumstances, it was not illegal under any law applicable to Defendant with respect to this case. Indeed, the police’s own informant, Plerro, was engaged in just this type of enterprise as a hobby. See Def.’s App. at A52, A79.

Given this legal milieu, and keeping in mind the specific offense alleged in the warrant application was a violation of Conn. Gen. Stat. § 53a-217(a)(1), the two firearm parts did not provide a basis from which the affiants could reasonably conclude there was a fair probability Defendant was in possession of a complete, operable firearm. The police had no information related in the warrant application indicating Defendant had purchased, or even attempted to purchase, a firearm from Gunbroker.com or anywhere else. Defendant's apparent possession of two (or even nine) firearm parts simply could not support the conclusion that Defendant possessed a complete, operable firearm absent some indication in the affidavit substantially supporting that possibility. Based on what the police knew, Defendant was in lawful possession of two individual firearm parts and had committed no crime. Accordingly, there was no reasonable basis to suspect criminal activity.

In a closely analogous situation, the First Circuit Court of Appeals found a warrant application to lack a substantial basis to conclude the defendant laundered drug proceeds. See U.S. v. Vigeant, 176 F.3d 565 (1st Cir. 1999). The Vigeant court found the "commission" element of probable cause had not been met in large part because the "banking and investment activity [alleged] was not itself of a character sufficient to establish that the 'proceeds of some form of unlawful activity' ... were involved." Id. at 569 (context added). The court elaborated that the

fact that Vigeant [the defendant] subsequently invested a portion of the money in a boat and real estate nudges us no closer to the conclusion that "probable criminality" occurred. For one thing, like the banking activity, there were no allegations that suggest the purchases were made with the proceeds of unlawful activity. Second, activity of this type could be consistent with legitimate business that might be transacted by a company named Versatile Investment Group; that is, legitimacy is at least as reasonable an inference from the allegations as is criminal activity. For these reasons, we do not see how this information makes more probable the

conclusion that money laundering occurred. As we have said, probability is the touchstone, and here there is no more than a remote, speculative possibility that the Vigeant affidavit evidenced money laundering activity.

Id. at 571 (context added). The court also noted that the warrant application's linking the banking activity with the drug trafficking was lacking and that the remainder of the warrant application relied on "conclusory statements." Id. On these bases, the court found there was no probable cause and vacated the defendant's conviction. Id. at 575.

As with the defendant's activity in Vigeant, Defendant's activity here – the purchase of unregulated firearm parts – was lawful, as the affiants admitted. See Def.'s App. at A53. And while the affidavit adopts Pierro's claim that the "only reason" Defendant would purchase the parts was to construct his own AR-15, that claim fails to comport with common sense. Pierro himself was in possession of AR-15 parts, not for use to construct an operable AR-15, but to sell as a "hobby." Def.'s App. at A52. The affidavit itself, therefore, dispels the notion that the "only reason" someone would possess AR-15 parts was to construct an operable AR-15. Defendant's conduct, therefore, was "not itself of a character sufficient to establish ... unlawful activity," and "legitimacy [was] at least as reasonable an inference from the allegations as [was] criminal activity."<sup>14</sup> See Vigeant, 176 F.3d at 571 (grammatical changes added).

---

<sup>14</sup> In another closely analogous case, Minn. v. Carter, 679 N.W.2d 199, 205-206 (Minn. 2005), the Minnesota Supreme Court considered whether a defendant's criminal record, combined with law enforcement's "observations and suspicions" and the statement of a "citizen witness" regarding the defendant's frequent visits to his storage unit, provided probable cause to believe the defendant was engaged in drug trafficking. The court rejected the probable cause finding, holding that the police's suspicions were unsupported in the affidavit, and that the "corroboration" provided by the "citizen witness" failed to make it more likely that crime was afoot: "[T]here may be many legitimate reasons to visit a storage unit frequently. Without more, the mere fact of frequent visits to a storage unit does not provide evidence of the 'fair probability' that contraband is inside." Id. at 206. As the court in Vigeant found, "there may be many legitimate reasons" to explain otherwise

A number of cases involving very different charges, alleged child pornography possession, are also instructive here. Toccaline, 2003 Conn. Super. LEXIS 2067, at \*12-13, and Falso, 544 F.3d at 120-124, both stand for a similar proposition: that where the warrant application fails to allege conduct that would violate the law in question, probable cause cannot be found. See also U.S. v. Perez, 247 F.Supp.2d 459, 474-486 (S.D.N.Y. 2003) (finding that federal criminal child pornography possession statute does not criminalize mere viewing of illegal images, so allegation that the defendant may have viewed the images without possessing them was insufficient for probable cause); cf. Burnett v. Fla., 848 So. 2d 1170 (Fla. App. 2d Dist. 2003) (finding that defendant's possession of videotape evidence of nude minors did not support inference of his possession of child pornography on his computer when the warrant failed to connect the two distinct offenses).

In Toccaline, 2003 Conn. Super. LEXIS 2067, at \*12-26, the court, Swienton, J., reviewed the four corners of a search warrant for the defendant's home and computer for evidence the defendant possessed child pornography. Id. at \*2-3. Specifically, the warrant application alleged that the defendant's use of credit cards with an adult verification Web site; his disclosure of his email address with the alleged pornography Web site; the police's description of the Web site as containing the "best lolitas;" and the defendant's prior sexual assault convictions provided probable cause for the search. Id. at \*16, 21-22. Finding that the warrant application made no allegation that the defendant had actually downloaded, or visited a Web site that contained illegal pornography, however, the court found the application did not present probable cause. Id. at \*12-26. "[J]ust because the defendant

---

"suspicious" conduct. Suspicious conduct alone fails to provide probable cause. As already mentioned, the warrant application here presents no circumstances warranting suspicion, let alone probable cause, for criminal activity.

subscribed to a website ... [whose name, "usa-lolita.com,"] suggested prohibited content does not, in itself, mean that the website contained illegal content" or that the defendant downloaded it. Id. at \*23. The court noted that while the warrant application might have established probable cause for a charge of attempt to possess child pornography, the warrant application did not allege such a charge, and that because the law limited consideration of probable cause to the offense(s) alleged in the application, probable cause could not be found. Id. at \*13-14. Because the affidavit was supported by only mere suspicion, the court suppressed the evidence of child pornography found on the defendant's computer as a result of the defective warrant's execution. Id. at \*30-31.

In Falso, the Second Circuit Court of Appeals considered a defendant's challenge to a 26-page warrant application to search the defendant's home for evidence of child pornography. The affidavit included general information about how child pornography collectors use computers and the Internet to collect child pornography, and specific information about the investigation tending to implicate the defendant. 544 F.3d at 113-114. Ultimately, the affidavit only charged the defendant with having "appeared to have gained" or "attempted to gain" access to child pornography through a specific Web site detailed in the application. Id. at 121. The Falso court refused to uphold the probable cause finding against the defendant, holding that

[e]ven if one assumes (or infers) that Falso accessed the [alleged child pornography Web] site, there is no specific allegation that Falso accessed, viewed or downloaded child pornography. While the non-member site contained approximately eleven images of child pornography, the affidavit lacks any information about whether the images were prominently displayed or required an additional click of the mouse; whether the images were downloadable; or what other types of services and images were available on the site.

Id. at 121 (context added). Hence, the Falso court concluded that the affidavit lacked any information suggesting the defendant had actually possessed child pornography, which the offense in question required. Id. Short of such an allegation, there was no substantial basis to believe the defendant had violated the law. Thus, the defendant's mere appearance of having gained access to a Web site that might have contained child pornography at some unspecified level of navigation was too innocuous without stating what, if anything, the defendant had actually downloaded and possessed. Id. As the Falso court recognized, to find otherwise would create probable cause even where a person unwittingly began to access a Web site unobtrusively containing illegal material, but upon making that realization, left without actually accessing it. Id. at 118-119, 124; see also Perez, 247 F.Supp.2d at 485 (same). In other words, innocuous conduct would be unduly suspected without any individualized evidence that crime was actually afoot.

As applied in Defendant's situation, it is a "firearm" (not child pornography) that the police averred they had probable cause to suspect was in Defendant's home. To make such a claim, the police were required to infer that – based on a single part (the drum magazine), purchase of a second part (the upper receiver) and the entirely speculative possession of a few other parts (which required the assumption that the prior transactions, over a two-year period, were also for compatible AR-15 parts, which there was no basis whatsoever for the police to believe)<sup>15</sup> – Defendant possessed an operable firearm, since

---

<sup>15</sup> Furthermore, given that Defendant's alleged transactions on Gunbroker.com had occurred over a two-year period, there was no apparent expediency for the police to rush to any conclusions about the prior purchases. Moreover, the affiants noted that the ATF subpoenaed Gunbroker.com for Defendant's transaction history but not yet received a response from the Web site. Def.'s App. at A52. There is no explanation in the affidavit as to why it was not reasonable for the affiants to await the results of the subpoena rather than barrel ahead and violate the sanctity of Defendant's home based on mere suspicion.

the police admitted the parts themselves were not illegal for Defendant to purchase or possess. See Def.'s App. at A53 ("...as a convicted violent felon [Holley] is prohibited from possessing or purchasing a firearm legally," but "could, however, purchase the necessary parts..."). Like the warrant applications in Toccaline and Falso, however, the warrant application here contained no allegation supported by more than bald conjecture that Defendant actually possessed an operable firearm or the means to build one. Nor did the application allege an attempt to violate the applicable statutory offense, which was fatal to the warrant in Toccaline. Cf. Burnett, 848 So.2d at 1174-1176. Indeed, the affidavit here is based purely on the affiants' mere suspicion that Defendant – who made lawful purchases on a legitimate Web site used by the police's own informant – was trying to build a firearm because of his supposed "violent" conviction and "advanced knowledge" of firearms, claims that (as detailed below) were insufficiently supported or speciously claimed in the affidavit. The trial court uncritically accepted the police's mere suspicion and thereby erred in denying Defendant's motion to suppress.

Also as fatal to the trial court's probable cause finding here is that, as in Toccaline and Falso, the affidavit failed to allege the Web site in question (Gunbroker.com) sold anything more than firearm parts. The warrant application fails to allege someone could buy a complete, operable "firearm" on Gunbroker.com, and the reasonable inference from the affidavit is that Gunbroker.com sells firearm parts only. As the court in Toccaline found in the context of illegal pornography, assuming from the name "Gunbroker.com" that it sells complete, operable firearms is not permissible without support for that proposition. See 2003 Conn. Super. LEXIS 2067, at \*22-23 (finding that the "averments that the website's domain name and description contained the word 'lolita,'" a term commonly known to refer

to underage pornography, were insufficient to establish the Web site contained illegal pornography).

In sum, as with the warrant applications in the above cases, the application in this case failed to sufficiently allege a fair probability that criminal activity had occurred.<sup>16</sup> Given the lack of support for the conclusion Defendant had violated Conn. Gen. Stat. § 53a-217 by merely possessing two then-unregulated firearm parts, the question remains whether the additional allegations in the warrant could reasonably propel Defendant's otherwise innocuous possession of those parts from the realm lawful activity to that of probable cause to believe Defendant possessed a firearm. As noted, below, it does not.

**b. The additional factors listed in the search warrant application for Defendant's home did not provide a sufficient basis for probable cause.**

The application listed five basic factors/sources to support probable cause for the proposed search: (1) conclusions drawn from the affiant's "training and experience;" (2) information provided by Pierro; (3) Defendant's 1996 conviction for conspiracy to commit assault in the first degree; (4) information provided by the ATF; and (5) surveillance and background checks related to Defendant's home address. Unfortunately, these factors/sources, even taken in their totality, failed to establish probable cause for two glaring reasons. First, given the facial legality of Defendant's alleged purchase of firearm parts, the police were forced to found the remainder of the details in their affidavit on unreliable information, conclusory statements and/or specious "corroboration." And second, given the police's reliance on the same, the trial court was forced to go outside the four

---

<sup>16</sup> While, as in Toccaline, it is arguable that the police could have made a case for an attempted possession charge, the police only alleged possession of a firearm in the warrant application, not attempted possession. That being the case, the trial court was not authorized to analyze probable cause for a theoretical attempted possession case the police failed to allege. Id. at \*13-14.

corners of the warrant application to establish probable cause. The insufficiency of each of these areas is detailed below.

- i. ***The search warrant application for Defendant's home was premised on unreliable information, conclusory statements and/or specious "corroboration."***

The first major defect in the search warrant affidavit for Defendant's home relates to the reliability and probative value of the police's sources of information about most of the matters in the affidavit. (Taken without any common sense-criticism, the contents and conclusions of the affidavit may reasonably be regarded as summarized for these purposes in Part II.A of this brief, supra.) Neither the affiants, nor the informant they relied on, were shown to be sufficiently reliable to make the conclusions in the affidavit that were necessary to implicate Defendant in criminal activity. Indeed, under basic scrutiny, the conclusions in the affidavit most critical for a valid finding of probable cause fail. As a result, the trial court's reliance on those conclusions was in error.

- a. **Pierro was not shown to be a sufficiently reliable source of information and the police's "corroboration" of his allegations did not make criminal activity more likely and/or bolster Pierro's reliability.**

Clearly, Pierro was the police's main source of information in support of the warrant application for Defendant's home in this case. Pierro was not shown to be reliable in the most critical respects, however. Pierro only had first-hand knowledge of Defendant's attempted purchase of the "M16 AR 15 A2 upper receiver" part. Beyond this, there is no basis in the affidavit to reasonably infer Pierro knew anything that would propel Defendant's otherwise lawful purchase of a part from Pierro into the realm of probable criminal activity.

First, according to the affidavit, Pierro's only bases of information were limited to Defendant's attempted purchase of the upper receiver part, a Google.com search of

Defendant's name and vaguely referenced "Gunbroker.com records" that allegedly showed Defendant had eight prior transactions on Gunbroker.com. Pierro's claim that Defendant was involved in a shooting "several" years ago was demonstrably exaggerated, since the incident was actually nearly two decades old and Defendant was convicted of conspiracy, not of the underlying, substantive crime itself. The application does not allege Pierro spoke with Defendant, met Defendant in person or had any non-speculative, firsthand basis of knowledge to believe, let alone know, whether Defendant possessed a "firearm" within the meaning of the law. The affidavit also fails to allege Defendant purchased an operable firearm from Pierro. Pierro's sources of information hardly indicate Pierro had a special basis of information that would not have been available to anyone with a computer, a Web browsing program and a Gunbroker.com account, which is to say everyone.

Possession of such widely available information does not establish an informant's credibility or reliability. Numerous appellate court decisions hold informants of any stripe to a firsthand knowledge standard in relation to their alleged contact with a defendant. See, e.g., Duntz, 223 Conn. at 217-218 (alleged citizen informants not shown to have personal knowledge of alleged criminal activity of the defendant); Carter, 697 N.W.2d at 206 (citizen informant's observation of the defendant's frequent visits to storage unit failed to reliably substantiate criminal activity); Parish v. Tex., 939 S.W.2d 901, 204 (Tex. Crim. App. 1997) (details alleged to corroborate informant that were "ascertainable by anyone" the defendant may have been in contact with do not support an informant's reliability or basis of knowledge); Rojas v. Tex., 797 S.W.2d 41, 44 (Tex. Crim. App. 1990) (informant found to lack reliability because the informant had no apparent firsthand knowledge of criminal activity by the defendant and the information provided was public knowledge). Here,

Pierro's only firsthand knowledge of Defendant exclusively involved Defendant's attempted purchase of the upper receiver from Pierro, which was a lawful act.

Second, Pierro's other contributions to the warrant application cannot be credited. There is no evidence the affiants ever met with Pierro in person, or took a single investigative step to confirm his identity, background or knowledge related to firearms or firearm parts. Instead, they simply assumed he was a retired police officer and embraced his most specious allegations.<sup>17</sup> Although the affidavit notes Pierro's selling of parts on Gunbroker.com was just a "hobby,"<sup>18</sup> the affiants treat him like an expert on firearms and firearm parts. There is simply no basis to reasonably infer this from the affidavit. It contains nothing to substantiate Pierro was once a police officer; that, even if he was a police officer, he had experience investigating crimes that would make him knowledgeable or trustworthy related to firearms; or that he had sufficient knowledge about firearms to make conclusions such as the "only reason" someone would buy an upper receiver was to construct an operable AR-15.<sup>19</sup> From what the affidavit related, the police never met Pierro or questioned anything he said about himself.

---

<sup>17</sup> The affiants also did not confirm whether Pierro (assuming *arguendo* he was in fact a retired police officer) had ever had a warrant application denied for including too much conjecture or failing to include enough verifiable facts to establish probable cause; or under what circumstances Pierro had left the law enforcement profession. These are also relevant considerations to evaluate his reliability.

<sup>18</sup> The Oxford English Dictionary defines "hobby" in this context as a "pursuit outside one's regular occupation engaged in especially for relaxation." Based on this definition, one cannot reasonably assume sufficient proficiency from a hobbyist, as the affiants did here.

<sup>19</sup> Based on the warrant application alone, Pierro's conclusion that the "only reason" someone would purchase an upper receiver was to construct an AR-15 is demonstrably false. First, Pierro possessed the upper receiver himself, not to construct an AR-15, but to engage in the "hobby" of selling parts. Second, shortly after stating it was the "only reason," the warrant then claims it was the "likely scenario," down-grading the level of certainty from 100 per cent to much less certain than that.

Likewise, the court allowed the affiants to hide behind the “citizen informant” doctrine by pointing to the police’s “corroboration” of Pierro as “proof” of his reliability. Def.’s App. at A83-A85. Unfortunately, the police’s “corroboration” of Pierro adds nothing to make it more likely Defendant possessed a firearm or to bolster Pierro’s reliability about the ultimate conclusions he made. What the police “corroborated” were (1) Defendant’s apparent identity and home address; (2) Defendant’s purchase of the upper receiver part on Gunbroker.com from Pierro;<sup>20</sup> (3) Defendant’s purchase of a second part (the drum magazine) a few weeks earlier on Gunbroker.com; and (4) Defendant’s alleged involvement in a 1994 shooting. This supposed “corroboration,” however, fails to establish Pierro’s reliability to divine whether Defendant possessed or was constructing an operable firearm. It is nearly identical in character to the “corroborative” investigation deemed lacking in State v. Covelli, CR18-78031, 1993 Conn. Super. LEXIS 2321, at \*2-3 (Conn. Super. Ct. Sept. 14, 1993), where the police claimed to have corroborated an informant’s reliability through verifying that the owner of the motorcycle shop mentioned by the informant was in fact the defendant, as the informant had previously claimed. Corroboration of a detail that does not make the likelihood of criminal activity more probable is not actually corroboration.

In reality, the “corroboration” conducted here shows Pierro had a very limited basis of knowledge about Defendant’s purchase of one unregulated firearm part on Gunbroker.com, and that Pierro was wrong about when Defendant’s past criminal case occurred. That Pierro knew Defendant’s home address is meaningless for probable cause in the context of this case, just as was a similar detail about the defendant in Covelli. Conveniently, the affidavit here failed to mention that the police could not (or did not)

---

<sup>20</sup> Notably, Defendant made no attempt to conceal his identity in this or any other Gunbroker.com transaction mentioned in the warrant application.

corroborate (1) whether Pierro had actually been a police officer; (2) Pierro's training, knowledge or experience with firearms or firearm parts; and/or (3) whether Pierro was even who he purported to be. Because the conclusion made by Pierro that was most helpful to the police – that the “only reason” someone would have firearm parts was to build an operable firearm – was specious based on the affidavit alone, these omissions are fatal to Pierro's reliability and the affidavit's validity.<sup>21</sup> The trial court erred in treating the affiants' supposed “corroboration” as amounting to anything more than confirming lawful activity and/or publicly available details (such as Defendant's address). See Def.'s App. at A85.

---

<sup>21</sup> In order to shore up Pierro's lack of reliability, the affiants mentioned that the “ATF does agree with Pierro's conclusion.” Def.'s App. at A53. From the text just preceding that claim, however, it is difficult to tell which “conclusion” they meant. The full, relevant paragraph reads thusly:

THAT Pierro informed police that the only reason someone would purchase a M16 AR 15 A2 upper receiver is if they were assembling a M16 and/or AR15 assault rifle. Pierro indicated that with Holley making eight additional purchases from Gunbroker.com that this was the likely scenario. Possession of a M16 AR 15 A2 upper receiver is necessary in order to assemble a functioning M16 and/or AR15 assault rifle. The ATF does agree with Pierro's conclusion.

Id. Is the ATF's agreement with the conclusion just preceding the last sentence, meaning the ATF agreed that an upper receiver is necessary to assemble an AR-15? Basic grammatical structure would suggest so. But even assuming arguendo that the affiants meant the ATF agreed with the claim that the “only reason” / “likely scenario” someone would buy an upper receiver was to construct an operable AR-15, that claim suffers from the same fatal ambiguity: what is meant by the “ATF”? The ATF as a whole entity agreed or an individual person at the ATF? The first possibility is impossible and the second is not identified.

Hence, from this affidavit, we cannot know with any reasonable certainty what conclusion the “ATF” agreed with: the self-evident one that one would need an individual part to build the whole, or the specious one, that there is only one reason a person might possess the upper receiver part? We also cannot reasonably ascertain who at the ATF allegedly “agreed.” The director, a secretary that answered the phone, a special agent whose specialty is drugs, not firearms? The answers to these questions are critical to the reliability of the underlying conclusion, but since they cannot be answered, the “ATF's” contribution to this aspect of the warrant is unworthy of any credit the trial court afforded it. See Def.'s App. at A84.

The Connecticut Supreme Court has been quick to discredit an informant's contribution to probable cause where, as here, there is no basis in the warrant application to establish the informant is a suitably verified, reliable citizen informant. See State v. Duntz, 223 Conn. 207, 218 (1992); see also Barton, 219 Conn. at 550 (noting that informant provided statements and physical evidence against the defendant "in person at police headquarters," so his identity was not in question); Parish, 939 S.W.2d at 204-205 (police corroboration of informant tip found to be insufficient where it simply verified publicly available information that the defendant was observed at the motel mentioned in the tip). In Duntz, the state had alleged various informants the search warrant application at issue had claimed were reliable were "citizen informants" that need not be verified beyond that. 223 Conn. at 218. The Court rejected the state's claimed defense of the informants, stating that despite

the state's assertion in its appellate brief that the sources were citizen informants, we are unable to discern from the affidavit whether the sources are uninterested citizens, or "criminals, drug addicts, or even pathological liars" whose motives for providing information to the police may be far ranging and perverse. The sole piece of information in the affidavit tending to suggest that the sources are reliable is the affiants' assertion that the sources feared the defendant.

Id. (internal citation omitted). Duntz requires more than the state's bald assurance that an informant is a citizen informant and reliable. It requires a substantial factual basis for this and not simply verbalizing a talismanic phrase. And while Pierro's identity was ostensibly known here, the warrant application lacks any indication as to what verification of Pierro's identity or background was conducted. The "corroboration" emphasized by the trial court had nothing to do with Pierro's conclusory claims about the likelihood Defendant intended to build and/or possessed a firearm, and that is fatal to this warrant. As far as the affidavit evinces, the police blindly accepted Pierro at his word, sight unseen, over a telephone call

and based on flimsy “corroboration” that failed to establish Defendant had committed any illegal act. In short, the police and the state wanted Pierro to be a “citizen informant,” and so he was, despite there being no basis in the affidavit to support that conclusion. The trial court, therefore, erred in drawing the same conclusion.

**b. Defendant’s nearly 20-year-old conviction provided little support for probable cause.**

The warrant application also makes much of Defendant’s conviction for conspiracy to commit assault in the first degree. Indeed, the application even exaggerates Defendant’s 1996 conviction for emotive effect: “since Holley is a convicted violent felon....” Def.’s App. at A82 (emphasis added). But the law is clear that a remote conviction for an offense unrelated to the one presently charged has marginal to no relevance to a finding of probable cause. *See, e.g., Duntz*, 223 Conn. at 220 (indicating that prior convictions “included in the affidavit dated back fifteen or sixteen years prior to the time of the warrant application” were remote in time); *Falso*, 544 F.3d at 121-124 (finding the “sheer length of time [18 years] that had elapsed renders [the defendant’s] prior sex crime only marginally relevant, if at all,” particularly since the prior conviction was for a different offense than the charges in the warrant application); *Carter*, 697 N.W.2d at 205 (finding a five-year-old conviction to not support probable cause because a “criminal record, even a ‘long’ one, is best used as ‘corroborative information’ and not as the sole basis for probable cause. ... Convictions that are several years old are less reliable in providing a ‘fair probability’ that contraband will be found in a place to be searched.”) (internal citations omitted); *Minn. v. Blackstein*, 507 N.W.2d 842, 847 (Minn. 1993) (same for seven-year-old conviction for same offense); *U.S. v. Campbell*, 732 F.2d 1017, 1020 (1st Cir. 1984) (criminal reputation alone insufficient to establish probable cause).

And while Defendant's status as a felon was relevant to the offense alleged here up to a point (it is an element of Conn. Gen. Stat. § 53a-217(a)(1)), the affiants used it as much for propensity. The warrant application claims Defendant was a "convicted violent felon," but fails to disclose what alleged violence Defendant committed. According to the affidavit, Defendant's conviction was for conspiracy to commit assault in the first degree, related to a 1994 shooting. But there is no allegation in the affidavit that Defendant perpetrated the shooting in that case. This is important because of the conspiracy aspect of the conviction. Given the conspiracy theory underlying the conviction, Defendant would not necessarily have been found to be the shooter in that case. That is, one could be found guilty of conspiracy to commit assault in the first degree without ever having committed any violence. And based on the affidavit's contents here, there is nothing to suggest Defendant committed any "violent" act (or that he had any motive to do so in the future) simply because he had a nearly 20-year-old conviction for an unrelated and different offense the affidavit fails to detail beyond utilizing vague, inflammatory and largely unsubstantiated terms like "shooting" and "violent felon." Furthermore, Defendant's remote conviction really has no relevance here since his felon status did not preclude him from purchasing or possessing the unregulated firearm parts.

The trial court erred in treating Defendant's conviction like propensity evidence. See Def.'s App. at A84 (trial court stating Defendant convicted of firearms-related offense when there was no support in warrant indicating Defendant actually committed the shooting). To allow a distant conviction for a different offense to raise bald suspicion to probable cause, on the basis of lawful activity, would mean "any individual with a criminal record involving

firearms ... can be searched for arms at any time;" but there is "no authority for such a broad proposition." Campbell, 732 F.2d at 1020. As the Duntz court said,

[a]lthough the affidavit also contained information regarding the defendant's criminal record, "in the absence of similar methods of commission or other common features between otherwise unrelated crimes, we will not adopt a theory of probable cause" which depends upon a theory of general criminal propensity.

223 Conn. at 220-221 (context and emphasis added; quotes in original). In short, just because Defendant had a remote conviction for an offense related to a shooting incident did not make it more likely that he was lawfully purchasing firearm parts to commit a crime, and for the trial court to conclude otherwise was error.

**c. The affiant officers had no demonstrated expertise with firearms.**

Among the relevant factors to be weighed in determining whether probable cause has been established is the basis of the affiants' knowledge for conclusions made in the search warrant affidavit. Barton, 219 Conn. at 544-545. Where the affiants have drawn conclusions on matters beyond their training and experience, as evident in their affidavit, however, courts have been unwilling to accept those conclusions as supporting probable cause. See, e.g., Burnett, 848 So.2d at 1174-1175 (finding that because the affiant offered conclusions in support of probable cause in child pornography case when she had no stated experience with investigating such cases, probable cause for search warrant could not be found). In Defendant's case, the affiant officers lacked any stated experience or training in firearms or firearm parts, and yet made conclusions about the same.

In the first paragraph of the search warrant application's affidavit, the affiant officers disclose their identities and investigatory experience, presumably to provide the trial court with the experiential basis for some of their conclusions in the warrant application. As is relevant here, the affiants attested the following related to their experiential backgrounds:

THAT the affiants ... are presently assigned to the Greater New Britain Shooting Task Force. This is a multi-agency investigative unit charged with reducing violent crime in the greater New Britain area. The affiants have a combined total of over thirty-five (35) years of investigative experience.

Def.'s App. at A52, A79. They offer no additional elaboration on their experience in the remainder of the affidavit. Absent from their declaration is whether they have any experience with firearms, firearm parts or firearm-related investigations. They attest only that their unit is tasked with "reducing violent crime," but offer no further explanation of what special training their unit has in investigating cases involving the alleged possession of firearms or (more importantly for this case) firearm parts.<sup>22</sup> Notably, Defendant was not charged or convicted with a violent crime here.

In Burnett, the court found that because the "affiant's education and experience in matters of child pornography were not set out, nor did the affiant indicate the degree of commonality that is alleged to exist," there was no way for the magistrate to accept the affiant's conclusion that the defendant "retain[ed] child pornography images" on his

---

<sup>22</sup> The affiants' lack of knowledge about firearms or firearm parts is patently obvious from the warrant application alone. For example, they repeatedly refer to the firearm parts in their affidavit using the Gunbroker.com sale-listing titles (the "M16 AR 15 A2 upper receiver" and the "MGW AR-15 AR15 90 round drum"), which are not technical terms of art for the parts, but a string of keywords meant to be picked up in a search on the Web site for something containing one of the keywords or sufficiently similar to it. This is evidence from the warrant where the "MGW AR-15 AR15 90 round drum" mentioned on the third page of the warrant is in a font smaller than the rest of the text of the affidavit, indicating the "MGW AR-15 AR15 90 round drum" was cut and pasted from the sale-listing but never re-formatted to be the same font size as the rest of the affidavit. See Def.'s App. at A53. Anyone with even a rudimentary knowledge of firearms would realize the listing titles (which contain duplicative terms) are not how you refer to the parts in normal parlance, so the affiants' repeated use of the listing title is indicative of their lack of knowledge about firearms and parts. Another example is the affiants' reliance on Pierro and the "ATF" for information about firearms and their parts. If the affiants were versed in firearms, they would have had no need to rely on an unverified informant or undisclosed parties at the ATF, and yet they did, at least until they needed to make additional claims Pierro or the "ATF" did (or would) not.

computer just because the affiant had investigated "over two hundred ... crimes against children," none of which might have involved child pornography. 848 So.2d at 1174-1175 (grammatical change added). Similarly here, the affiants provided next to nothing about their training and experience in general, and literally nothing about their experience with firearms or firearm parts in particular. Violent crime entails innumerable instruments of violence, not exclusively or necessarily firearms. Moreover, even assuming arguendo that the affiants have investigated violent crime involving firearms (which requires a bald assumption based on the contents of the affidavit), this does not mean either one of the affiants has any experience with firearms or firearm parts sufficiently enough to allow them to make the conclusions they do about firearms, firearm owners or firearm parts. The affiants' basis for making claims related to these areas that rest on their "experience and training" are insufficiently disclosed and, therefore, fatally lacking as support of probable cause here.

Although it is evident from the affidavit that they did not, even assuming arguendo that the affiants' had some type of minimal training or experience with respect to firearms or firearms parts, the affiants' claims referenced in the segment of Part II.A summarized on page 3 of this brief (i.e., the full paragraph summarizing the claims the affiants base on exclusively on their undisclosed "training and experience") all involve conclusions regarding firearms or firearm parts that are wrong, offer no meaningful information and/or suffer from specious logic. First, the affiants claimed that because defendant was legally able to purchase individual parts, he "could" purchase all the parts necessary to construct an AR-15. Federal law renders this conclusion incorrect, which both the affiants and the ATF should have known, because the lower receiver is federally regulated and can only be sold

by a federally licensed firearms dealer. See footnote 12, supra. Hence, Defendant would not have been able to purchase this part from Gunbroker.com using his own identity, which the affidavit indicates he used for his transactions there.

Second, the affiants fallaciously inferred that because Defendant is a member of Group A (those who legally buy firearm parts online), he must be a member of Group B (those who illegally build operable firearms or possess them), while ignoring the innumerable other possibilities, such as being a lawful parts dealer, making a lawful purchase for a family member, etc. This is the classic logical fallacy rejected by the Falso court, albeit in a different context. See 544 F.3d at 122. The trial court also improperly indulged in this logical fallacy in order to justify its decision. Def.'s App. at A86. Third, the affiants claim that an "M16 AR 15 A2 upper receiver" is necessary to construct an AR-15. This tautology is the same thing as saying that an individual part necessary to construct an AR-15 is necessary to construct an AR-15. Which is to say that it states something so obvious that it lacks any meaningful support for probable cause.

Fourth, the affiants alleged that "typical firearms owners" do not buy firearm parts, and that since Defendant did, he "very likely" had "advanced knowledge" of firearms, which in turn meant he "probably" possesses "other" operable firearms. Besides there being no basis for the affiants' conclusion about what "typical" firearm owners do (or even what a "typical" firearm owner is) since we know nothing about their training and experience to make such conclusions, this is simply restating the same logical fallacy mentioned above (if A, then B), only using different words and taking additional leaps of faith.

Finally, the affiants also claimed that "people who posses firearms illegally commonly store said firearms in their residence ... [to] prevent[] the criminal from being

found in posses [sic] of a firearm by police in the course of daily activities.” This statement is bizarre, as it appears to allege that criminals alone (or more frequently) store firearms in their residences than do non-criminal firearm owners.<sup>23</sup> This claim defies common sense. It is at least as true to say that people who possess firearms legally commonly store those firearms in their residence, because where else would most people store their firearms? At their workplace? In their cars? Since it is safe to say that most people in Connecticut in the course of their daily lives do not carry firearms around, and because even doing so legally can even lead to unwanted consequences, see, e.g., Charges Dropped Against Lawyer Who Brought Gun to Batman Movie, The Conn. Law Tribune, Dec. 3, 2012, available at <http://www.ctlawtribune.com/id=1202580088088/Charges-Dropped-Against-Lawyer-Who-Brought-Gun-To-Batman-Movie> (last visited Oct. 3, 2015), it follows that most lawful firearm owners store their firearms at home. So, again, the affiants’ conclusion about where criminals supposedly store their firearms really amounts, if anything, to stating something so obvious that it cannot reasonably support probable cause. Furthermore, allowing such a basis for probable cause would essentially make any firearm owner subject to criminal suspicion, which would be absurd and unconstitutional.

Because the affiants had no relevant experience or training evident in the affidavit in support of the search warrant application for Defendant’s home, and because the conclusions they made despite their lack of expertise to do so were incorrect or logically fallacious, those conclusions do not support the trial court’s finding of probable cause here.

---

<sup>23</sup> At least in the undersigned’s experience in representing defendants and habeas petitioners in matters involving crimes with firearms, criminals – more frequently than non-criminal firearm owners it would seem – store firearms in the residences of non-felon relatives or friends than their own to avoid detection. The affiants’ conclusion to the contrary does not comport with the experiences of the undersigned.

ii. ***The trial court made additional improper findings that are not contained in the warrant application.***

Putting all of the afore-mentioned defects aside, the trial court made at least three errors in support of its finding of probable cause for the search warrant for Defendant's home that are fatal to that finding. Among the reasons the court found probable cause existed to justify the search of Defendant's home is this three-sentence segment:

[Defendant] was in possession of a firearm, which he was disqualified from possessing as a convicted felon. The defendant was storing a firearm at his residence. He was involved in the illegal trafficking of firearms.

Def.'s App. at A86-A87. But there is nothing in the warrant affidavit to support these conclusions or to suggest the issuing magistrate could have inferred them, unless you count the return, which was completed after the search was conducted, see id. at A58-A60, and the results of which could not be considered as a part of the "four corners" doctrine review, see, e.g., Duntz, 223 Conn. at 220; Shifflett, 199 Conn. at 746; Toccaline, 2003 Conn. Suprer. LEXIS 2067, at \*19-20 (rejecting allegation not contained within the four corners of the affidavit); Falso, 544 F.3d at 135-136 (same); U.S. v. Gourde, 440 F.3d 1065, 1067 (9th Cir. 2004) ("All data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath."). The affidavit does not allege Defendant had a firearm or was trafficking in firearms, just that he had parts, so it is unclear where the court could find these allegations without resorting to the contents of the return. Moreover, the court's progression from Defendant's alleged "possession of a firearm" (i.e., singular) to his alleged "trafficking of firearms" (i.e., plural) defies logic, particularly since the affidavit is premised only on Defendant's purchase of a part or two, and not on possession of a firearm itself. Nowhere in the affidavit is Defendant's possession of a firearm alleged with support beyond the affiants' mere

suspicion. The trial court's finding of probable cause was highly flawed in this respect, and because it could not have been sustained with what remained in its decision as justification, its decision must be reversed accordingly.

**2. The trial court's erroneous finding of probable cause was harmful error.**

Although Defendant does not believe the harmful error analysis applies in the context of this matter since the trial court had to find the suppression issue dispositive of the case, to the extent that this Court were to determine that it does apply to the resolution of the issue presented herein, Defendant avers that the fruits of the execution of the search warrant were harmful. In support of this, Defendant avers the following considerations. First, to accept Defendant's nolo contendere plea and allow this appeal, the trial court had to find that the decision on the motion to suppress would be "dispositive" of the prosecution against Defendant. See Conn. Gen. Stat. § 54-94a; Conn. Prac. Bk. § 61-6(a)(2)(A). This finding is akin to a finding of harmful error, because it means that the state's prosecution of Defendant could not go forward without the evidence secured from the search of Defendant's home authorized by the defective warrant. Second, prior to the search, the police had no evidence Defendant possessed a single firearm, as detailed above. Violation of Conn. Gen. Stat. § 53a-217(a)(1) requires possession of a firearm, not merely firearm parts, and the pre-search "evidence" amounted nothing supporting guilt under Conn. Gen. Stat. § 53a-217(a)(1). It was only after the defective search that the police had any evidence of alleged criminal activity. Hence, there can be no question that the fruits of the defective search warrant's execution were harmful beyond a reasonable doubt.

#### **IV. CONCLUSION AND REQUESTED RELIEF**

"Physical entry of the home is the chief evil against which the ... Fourth Amendment is directed, and unless Government safeguards its own capacity to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." Duntz, 223 Conn. at 220 (quoting U.S. v. U.S. Dist. Ct., 407 U.S. 297, 312 (1972)) (internal citations omitted). A finding of probable cause in the circumstances of this case would severely intrude on the centuries-old protection of the privacy of the home embodied in Connecticut's constitutional history. Any lawful purchase of legal firearm parts made online would become cause for law enforcement's intrusion into the sanctity of the home based on nothing more than bald, over-reaching suspicion. The law cannot suffer such a result. Because Connecticut's citizens' right to remain free of unreasonable searches of their homes "exists even when the alleged crime is ... repugnant and difficult to detect and prosecute," Toccaline, 2003 Conn. Super. LEXIS 2067, at \*30, and for all the foregoing reasons, this Court must reverse the trial court's finding, grant Defendant's motion to suppress and exclude all of the fruits from the defective search warrant for Defendant's home at issue here.

Respectfully submitted,  
THE DEFENDANT, JUBAR HOLLEY

BY: 

WILLIAM A ADSIT, Esq  
Appointed Counsel  
The Law Office of Christopher Duby LLC  
2558 Whitney Ave., Suite 203  
Hamden, CT 06518  
Juris No. 434478  
Tel. (203) 234-2888 / Fax (203) 234-1329  
william@cdubylaw.com

*His Attorney*

SC 19662 : STATE OF CONNECTICUT  
STATE OF CONNECTICUT : SUPREME COURT  
v. :  
JUBAR T. HOLLEY : OCTOBER , 2015

**CERTIFICATION**

Pursuant to Conn. Prac. Bk. §§ 67-2, 67-4 and 67-8 the undersigned certifies that the foregoing Brief of the Defendant-Appellant comply with all format provisions, including font and margin requirements, and further certifies that a copy of said document was mailed first class postage prepaid this        day of October, 2015 to: Hon. James M. Bentivegna, c/o Clerk, JD & GA14 Courthouse, 101 Lafayette Street, Hartford, CT 06106; and Susan Marks, Juris No. 402419, Office of Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, DCJ.OCSA.Appellate@ct.gov. In addition, the attached was sent via Department of Administrative Central Mail and Courier Service to Defendant-Appellant, Jubar T. Holley #229923, Enfield Correctional Institution, 289 Shaker Road, Enfield, CT 06082.

It is further certified pursuant to Conn. Prac. Bk. § 62-7 that the foregoing Brief: (1) has been filed with the appellate clerk electronically and delivered electronically to the last known e-mail address of each counsel of record; (2) has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (3) is the true, original copy of Defendant's brief previously filed electronically with the appellate clerk.

BY:



William A Adsit, Esq